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SUPREME COURT OF
THE STATE OF WASHINGTON

JAMIE FAST, et al.,
Petitioners

v.

KENNEWICK PUBLIC HOSPITAL DISTRICT, et al.,
Respondents

Court of Appeals Cause No. 31509-6-III
Appeal from the Superior Court of Benton County
The Honorable Cameron Mitchell
Benton County Superior Court Cause No. 12-2-01660-4

SUPPLEMENTAL BRIEF OF PETITIONERS

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INTRODUCTION AND ISSUE

This case presents an issue this Court has never considered. Where medical negligence causes the death of a viable unborn child, which statute of limitations applies to the parents' cause of action against the negligent health care providers: The medical negligence statute of limitations at RCW 4.16.350? Or the personal injury catchall statute of limitations at RCW 4.16.080(2)? The Fasts maintain that the medical negligence statute of limitations applies, because they are claiming "damages for injury occurring as a result of health care . . . based upon alleged professional negligence," (RCW 4.16.350). The lower court, however, held that the personal injury catchall statute of limitations applies because the Fasts' injuries do not constitute a "personal" or "physical" "injury suffered by the patient," (*Fast v. Kennewick Hosp. Dist.*, 188 Wn. App. 43, 51-53, 354 P.3d 858 (Div. 3 2015), *as amended*, *review accepted* 185 Wn.2d 1001 (2016)).

At issue is whether a parent's claim for the loss of their viable unborn child is an action "for damages for injury," as that phrase is used in the medical negligence statutes. **[YES]** If the Fasts' claim is characterized as a wrongful death action, then the question can be presented as whether the medical negligence statutes encompass a claim for wrongful death based on medical negligence. **[YES]**

The Fasts relied upon a one-year tolling provision Legislature inserted in the medical negligence statutes to encourage cases to settle out of court, in part to keep health care providers' professional negligence insurance affordable. If the Fasts' claim does not fall within the scope of RCW 4.16.350, then much of their claim would be time-barred because their request for mediation would not have tolled the statute of limitations. If, however, their claim is controlled by RCW 4.16.350, then the statute of limitations was tolled for one year when the Fasts requested mediation; the Fasts' claim was timely filed; and the lower court's decision must be reversed in part, and this case remanded for further proceedings.

This supplemental brief augments but does not supplant the appellate briefs and the Petition for Review. Arguments in those documents apply here even though they are not repeated herein: Including but not limited to standards on review and canons of construction.

ASSIGNMENTS OF ERROR

1. The lower court erred when it ruled that Legislature did not intend to encompass in the medical negligence statutes causes for wrongful death *based on* medical negligence, (*Fast* at 51-53).
2. The lower court erred when it ruled that the medical negligence statutes apply only to claims for *personal* or *physical* injury suffered by the patient, (*Fast* at 51-53).
3. The lower court erred when it ruled that a wrongful death action *based on medical negligence* is not an action for damages for injury *based on medical negligence*, (*Fast* at 51-53).

4. The lower court erred when it ruled that the term “damages” encompasses the concept of “injury” and that “damages” therefore restricts “injury” in the phrase “damages for injury” (*Fast* at 52-53).
5. The lower court erred when it followed *Wills*,¹ (*Fast* at 50-53).
6. The lower court erred when it assumed that Legislature acquiesced to the interpretation in *Wills*, (*Fast* at 53).
7. The lower court erred when it ruled that statutes of repose can be disregarded because they are “illogical and unjust,” (*Fast* at 52).
8. The lower court erred when it held that the Fast’s claim was not timely filed.

STATEMENT OF THE CASE

Appellants rest on the statement of the case in Pet. for Rev.

ARGUMENT

1. LEGISLATURE EXPRESSLY INCLUDES WRONGFUL DEATH ACTIONS WITHIN THE AMBIT OF THE MEDICAL NEGLIGENCE STATUTES.

Within the ambit of the medical negligence statutes, (*i.e.*, within the scope of the phrase “civil actions . . . for damages for injury occurring as a result of health care,” (RCW 7.70.010)), Legislature expressly includes wrongful death actions. At RCW 7.70.150, for example, Legislature addresses “an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates

¹ *Wills v. Kirkpatrick*, 56 Wn. App. 757, 785 P.2d 834 (Div. 2 1990).

the accepted standard of care,” (Laws of 2006, ch. 8, § 304 (emphasis added)). Similarly, at RCW 7.70.090, Legislature states that board members of hospitals “are not individually liable for personal injuries or death resulting from health care administered by a health care provider granted privileges to provide health care at the hospital unless the decision to grant the privilege to provide health care at the hospital constitutes gross negligence,” (Laws of 1986, ch. 305, § 905; Laws of 1987, ch. 212, § 1201). In both instances, Legislature explicitly includes wrongful death within the ambit of “actions for damages for injury occurring as a result of health care,” as that language is used in the medical negligence statutes, (RCW 7.70.010, -110, and 4.16.350).²

“It is a familiar canon of construction, that when similar words are used in different parts of a statute, the meaning is presumed to be the same throughout.”³ The language at RCW 7.70.010 and RCW 4.16.350 were

² In the medical malpractice statutes, Legislature uses the term “personal injury” only twice, at RCW 7.70.150(1) and 7.70.090. In both locations, Legislature explicitly adds “death” or “wrongful death” to “personal injury.” In all other locations in the medical malpractice statutes where Legislature uses the terms “injury” or “injuries,” it does so without specifying any type of injury, (personal or otherwise), and in none of those instances does Legislature use the terms “death” or “wrongful death” as distinct from “injury” or “injuries,” (RCW 7.70.010, -030, -040, -050, -080, -100, -110, -150). In the one section where Legislature uses all three terms, it is clear that Legislature intends that the term “injury” includes wrongful death: “In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury alleged to have been caused by an act or omission that violates the accepted standard of care . . .” (emphasis added), (RCW 7.70.150).

³ See *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 722, 748 P.2d 597 (1988) (quoting *Booma v. Bigelow-Sanford Carpet Co.*, 330 Mass. 79, 82, 111 N.E.2d 742 (1953) (quoted in *DeGrief v. Seattle*, 50 Wn.2d 1, 11, 297 P.2d 940 (1956))); see also, e.g., *Welch v.*

drafted as part of the same medical malpractice tort reform act in 1976.⁴

The scope of the medical negligence statutes is set forth as follows:

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976. [emphasis added]

RCW 7.70.010; Laws of 1975-76, 2d Ex. Sess., ch. 56, § 6. Legislature incorporated the medical negligence statute of limitations at RCW 4.16.350 *by explicit reference* in RCW 7.70.010, to modify all actions within its scope. Legislature also introduced parallel language at RCW 4.16.350:⁵ “Any civil action for damages for injury occurring as a result of health care,” (Laws of 1975-76, 2d Ex. Sess., ch. 56, § 1). Thus, where Legislature set the scope of the medical negligence statute of limitations as “any civil action for damages for injury occurring as a result of health care” in Laws of 1975-76, 2nd Ex. Sess., ch. 56, § 1, (codified at RCW 4.16.350), it is presumed to have the same meaning as the parallel language in the same legislative act at § 6, (codified at RCW 7.70.010). Because “damages for injury” includes wrongful death at chapter 7.70

Southland Corp., 134 Wn.2d 629, 636, 952 P.2d 162 (1998); *Medcalf v. Department of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997); *Tegman v. Accident & Med. Inves., Inc.*, 150 Wn.2d 102, 113, 75 P.3d 497 (2003).

⁴ As recognized by *Fast* at 51; see Laws of 1976-76, 2d Ex. Sess., ch. 56, §§ 1 and 6.

⁵ As recognized by *Fast* at 51.

RCW, “damages for injury” also includes wrongful death at RCW 4.16.350.

Even if this is an action for wrongful death based on medical negligence, it nonetheless falls within the ambit of the medical negligence statute of limitations at RCW 4.16.350, which was tolled for one year when the Fastos requested mediation. This action was timely filed; the lower court should be reversed in part. *See* Assignment of Error # 1.

2. MEDICAL NEGLIGENCE CAUSES ARE NOT RESTRICTED TO RECOVERY FOR INJURIES SUFFERED BY THE PATIENT.

The lower court and *Wills* contradict this Court, which has repeatedly ruled that the plaintiff of a medical negligence action need not be the patient.⁶ Both Division I and Federal courts applying Washington law have also ruled that in medical negligence actions, “the plaintiff need not be the patient.”⁷ Many of the cases cited on this point, like the Fastos’

⁶ *See Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 664 P.2d 474 (1983) (applying medical malpractice statutes to wrongful death actions, this Court recognized a cause for lost chance of survival even where survival was unlikely; also referred to other wrongful death cases as “medical malpractice” actions); *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983) (parent has a right of action in medical malpractice for wrongful birth, and the child has a right of action in medical malpractice for wrongful life, even if the life did not exist at the time of the negligent act or omission); *Kaiser v. Suburban Transp. Sys.*, 65 Wn. 2d 461, 398 P.2d 14 (1965) (passenger sued a bus driver’s doctor for negligent prescribing that caused a crash – although this was before the medical malpractice statutes, the rationale has been incorporated into later decisions under the medical malpractice statutes).

⁷ *See Harris v. Extendicare Homes, Inc.*, 829 F.Supp.2d 1023 (W.D. Wash. 2011) (court applied medical malpractice statutes to wrongful death claim because it was an “action for damages” for “injury occur[ring] as a result of health care” (at 1028)) (*citing Branom*, 94 Wn. App. at 969); *Branom v. State*, 94 Wn. App. 964, 971, 974 P.2d 335 (Div. 1

case here, involve parents who sue for their own damages as a result of negligent health care provided to their children, and some specifically involve recovery for wrongful death of their children as a result of medical negligence.⁸

The lower court contradicts its own case law on this point.⁹ In *Webb*,¹⁰ for example, Division III recognized that “[i]t is well settled that, in a claim of negligent treatment, the plaintiff need not be the patient,” (*Webb*, 121 Wn. App. at 346). In *Webb*, the father sued his child’s psychologist under medical negligence when she implanted false memories of childhood sexual abuse. Even though the father was suing for his own derivative injuries, and even though he was not the patient, Division III ruled that his was an “action for damages for injury resulting

1999) (*citing Daly v. United States*, 646 F.2d 1467, 1469 (9th Cir. 1991)); *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (Div. 1 1986) (applying the medical malpractice statute of limitation when parents brought an action for their own injuries from injury to their child resulting from medical malpractice); *Bennett v. Seattle Mental Health*, 150 Wn. App. 455, 208 P.3d 578 (Div. 1 2009) (applying medical malpractice statutes to the mother’s action for her child’s death from negligent prescribing).

⁸ E.g., see fn 6, 7 (*above*) and 9, 10 (*below*); *see also*

⁹ *See Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 17 Wn. App. 828, 313 P.3d 431 (Div. 3 2013) (the lower court referred to this “wrongful death claim based on medical negligence” as “an action for injury resulting from health care,” and applied the medical malpractice statutes (Wn. App. at 863 (*emphasis added*))); *Jackson v. Sacred Heart Med. Ctr.*, 153 Wn. App. 498, 225 P.3d 1016 (Div. 3 2009) (applied the medical malpractice statute of limitation to a patient *and her husband’s* derivative injuries, and ruled that statute of limitation was tolled on requesting mediation); *Webb v. Neuroeducation Inc., P.C.*, 121 Wn. App. 336, 88 P.3d 417 (Div. 3 2004) *review denied* by 153 Wn.2d 1004 (2005).

¹⁰ *Webb v. Neuroeducation Inc., P.C.*, 121 Wn. App. 336, 88 P.3d 417 (Div. 3 2004) *review denied* by 153 Wn.2d 1004 (2005).

from health care,” (*id.* at 346 (emphasis added)), and the court applied the medical negligence statute of limitations, (*id.* at 343).¹¹

In *Jackson v. Sacred Heart*,¹² Division III considered a medical negligence case brought by a patient and her husband, (*Jackson*, 153 Wn. App. at 499). The plaintiffs requested mediation “pursuant to RCW 7.70.110,” (*id.* at 499-500). The court determined that the medical negligence statute of limitations at RCW 4.16.350 was tolled by RCW 7.70.110 for both the wife’s *and her husband’s* claims, even though the husband was not the patient, and his claims were derivative from the negligent health care provided to his wife, (*id.* at 500 fn. 1).

Even if the Fast’s injuries here are derived from the patient’s injuries then like *Webb*, *Jackson*, and other cases cited herein,¹³ the medical negligence statute of limitations applies.

The phrase “based on” in the medical negligence statute of limitations is particularly instructional here. This Court interpreted a similar statute of limitations in *CJC v. Corp. of the Catholic Bishop*,¹⁴

¹¹ It is worth noting that Division III here refused to apply the medical malpractice statute of limitations because the plaintiffs do not attempt “to recover for *physical* injury to a plaintiff, but to recover for a different type of loss,” (*Fast* at 52 (emphasis added)). To the extent that Division III is attempting to further restrict the term “injury” from “*personal* injury suffered by the patient” and now to “*physical* injury suffered by the patient,” it stands in stark contrast to its own holding in *Webb*, where the medical negligence claims were derived from *psychological*, not physical injuries.

¹² *Jackson v. Sacred Heart Med. Ctr.*, 153 Wn. App. 498, 225 P.3d 1016 (Div. 3 2009).

¹³ See fn 6-12, (*above*).

¹⁴ *C.J.C. v. Corp. of the Catholic Bishop*, 138 Wn.2d 699, 985 P.2d 262, 266-67 (1999).

where parents brought claims for their own injuries derived from the intentional sexual abuse of their children. The childhood sexual abuse statute of limitations reads in part:

All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods . . . [emphasis added]

RCW 4.16.340(1). Questions before the *CJC* court included whether the statute applies to defendants who did not *intentionally* abuse the child, but whose *negligence* contributed to the abuse; and whether the statute applies to parents' derived injuries *based on* the sexual abuse of their children. The *CJC* court interpreted the phrase "based on" and reasoned that "under the plain meaning of the statute, an action is 'based on intentional conduct' if intentional sexual abuse is the starting point or foundation of the claim," (*id.* at 709). The *CJC* court thus held that a claim against a party for *negligence* in failing to prevent *intentional* childhood sexual abuse, is a claim *based on intentional conduct* of the abuser, and is therefore controlled by RCW 4.16.340, (*id.* at 709, 713-14). The *CJC* court ruled that the scope of RCW 4.16.340 includes parents' *own* injuries from sexual abuse against their children, (even though the injuries are derivative), because they are *based on* sexual abuse.¹⁵

¹⁵ *C.J.C.*, 138 Wn.2d at 728-29; *accord Cloud v. Summers*, 98 Wn. App. 724, 734, 991 P.2d 1169 (Div. 1 1999).

Like in *CJC*, the starting point of the Fasts' claim here is medical negligence, and even if their injuries are merely derived from that medical negligence, RCW 4.16.350 nonetheless controls: "*Any civil action for damages for injury occurring as a result of health care . . . based on professional negligence, [emphasis added]*" (RCW 4.16.350).

The lower court contradicts long-settled law when it asserts that the medical negligence statutes are limited to personal or physical injury suffered by the patient. *See* Assignments of Error # 2 and # 3. The Fasts' claim was timely filed; the lower court should be reversed in part.

3. THE TERM "INJURY" IN RCW 4.16.350 IS NOT RESTRICTED BY THE TERM "DAMAGES" IN THE PHRASE "DAMAGES FOR INJURY." THE TERM "INJURY" IS RESTRICTED BY THE PHRASE "INJURY OCCURRING AS A RESULT OF HEALTH CARE."

The lynchpin of the lower court's rationale is its determination that where Legislature wrote "damages for injury," the term "damages" encompasses the concept of "injury," and therefore the term "injury" must mean something narrower than "injury" in general, (*Fast* at 52-53). On that rationale, the lower court asserted that Legislature meant personal or physical "injury suffered by the patient" where it wrote "injury," (*id.*).¹⁶

¹⁶ The arguments above this one point to Legislature's own words as well as a litany of case law demonstrating that *Wills* and Division III are incorrect on this point. This argument is separated for clarity because it demonstrates how lower courts incorrectly interpreted the statutory language based definitions of words and grammatical rules.

The medical negligence statutes do not define the terms “damages” or “injury,” thus it is presumed that Legislature intended their common law meanings.¹⁷ The court can consult a dictionary to ascertain a term’s meaning,¹⁸ and has often relied upon Black’s Law Dictionary for common law definitions of “injury” and “damages.”¹⁹

This Court recognized the definition of “injury” in Black’s Law Dictionary 856 (9th ed. 2009) as “the violation of another’s legal right.”²⁰ The Fasts’ loss of their unborn child to medical negligence is an injury because it is a violation of their legal right for which the law provides a remedy.²¹

This Court recognized the definition of “damages” in Black’s Law Dictionary 445 (9th ed. 2009) as “[m]oney claimed by . . . a person as

¹⁷ See Pet. for Rev. at 7-9 and cases cited therein; see also, e.g., *Baum v. Burrington*, 85 Wn.2d 597, 537 P.2d 266 (2003); RCW 4.04.010; *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 522, 530, 554 P.2d 1041 (1976) (construing “actual damages,” ordinary terms are given common meanings, legal terms are given their common legal meanings) (citing *Bradley v. United States*, 410 U.S. 605, 609, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973)).

¹⁸ E.g., *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008).

¹⁹ E.g., *Brown v. MHN Gov’t Servs., Inc.*, 178 Wn.2d 258, 277, 306 P.3d 948 (2013), concurrence of J. Gonzalez, (refers to *Black’s Law Dictionary* as “the standard legal dictionary,” for definitions of “exemplary damages” and “punitive damages.”); *Martini v. Boeing Co.*, 137 Wn.2d 357, 367, 971 P.2d 45 (1999) (for definitions of “actual damages” and “compensatory damages”).

²⁰ *Ambach v. French*, 167 Wn.2d 167, 174 n 3, 216 P.3d 405 (2009); see also *Rettkowski v. Dep’t of Ecology*, 128 Wn.2d 508, 517-518, 910 P.2d 462 (1996) (construing “injury” in RCW 90.14.190 as “[t]he invasion of any legally protected interest of another,” (quoting Black’s Law Dictionary 785 (6th ed. 1990))); Black’s Law Dictionary 801-02 (8th ed. 2004) (defining “injury” as “[t]he violation of another’s legal right, for which the law provides a remedy. . .”).

²¹ See RCW 4.24.010; Pet. for Rev. at 7-8; *Fast Br.* at 7-9.

compensation for loss or injury.”²² This Court recognized that “damages” does not mean the same thing as “damage:”

There is a clear distinction in the meaning of the terms "damage" and "damages." "Damage" is defined in Black's Law Dictionary as "Loss, injury or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property. The word is to be distinguished from its plural – 'damages', which means a compensation in money for loss or damage." The term "damages" is defined in Black's Law Dictionary as, "A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." Thus, it will be seen that "damage" is legal injury, and that "damages" is the pecuniary compensation for such legal injury.

Gilmartin v. Stevens Inv. Co., 43 Wn. 2d 289, 301-02, 261 P.2d 73 (1953).²³ Although the term “damage” might encompass the concept of “injury,” “damages” does not. *See* Assignment of Error # 4.

The lower court’s argument further fails to consider the entire phrase, “damages for *injury occurring as a result of health care*,” (RCW 4.16.350, 7.70.010, -110). The gerund “occurring” modifies “injury;” and the phrase “as a result of health care” is a row of prepositional phrases operating together as an adverb modifying the gerund adjective “occurring:” “[A]s a result” modifies “occurring,” and “of health care”

²² *Ambach v. French*, 167 Wn.2d 167, 174 n 3, 216 P.3d 405 (2009); Black’s Law Dictionary 416 (8th ed. 2004) (same).

²³ *See also, e.g., Ambach v. French*, 167 Wn.2d 167, 174 n 3, 216 P.3d 405 (2009); Black’s Law Dictionary 416 (8th ed. 2004).

modifies “result.”²⁴ Legislature used both words “damages” and “injury” because they do not mean the same thing, and Legislature needed to specify the type of injury, “injury occurring as a result of health care.”²⁵

When the entire phrase is read in this light, there is no redundant or ambiguous language, and therefore no need to insert words that Legislature did not write.²⁶ Where Legislature wrote “damages for injury,” it did not mean “personal or physical injury suffered by the patient;” it rather meant exactly what it wrote, “injury occurring as a result of health care.” *See* Assignment of Error # 4.

The Fastos claim monetary remedy for injuries occurring as a result of medical negligence, (CP 1-16). Their cause is therefore a “civil action for *damages* for *injury* occurring as a result of health care . . . against [health care providers] . . . based on alleged professional negligence,”

²⁴ *See* rules of grammar generally; e.g. Brian A. Garner, *The Redbook: A Manual on Legal Style* § 10 (2d ed. 2006); *see also* *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (courts employ the traditional rules of grammar to discern a statute’s plain meaning).

²⁵ Division III also overlooks the distinct usages of the preposition “for” in the phrase. Of the many definitions of the preposition “for,” two logically interpret the statute without rendering any terms redundant, and without having to insert words Legislature did not write. In the phrase “action for damages for injury,” the first “for” means “in order to obtain,” and the second “for” means “on account of,” so that the phrase can be understood as an “action *in order to obtain* damages *on account of* injury occurring as a result of health care.” *See* **Oxford English Dictionary** (CD-ROM ed. 2015) (defining “for” (*prep.* and *conj.*) at definitions (A)(9)(a) and (A)(21)); **Webster’s Third New International Dictionary** 886 (1966) (defining “for” (*prep.*) at definitions (2)(g) and (8)(a)).

²⁶ Courts should not read into unambiguous statutes words that Legislature did not write, (*see* *Fast* Reply Br. at 8-9).

(RCW 4.16.350). Their claim was timely filed, and the lower court should be reversed in part.

4. WILLS SHOULD BE OVERTURNED BECAUSE IT IS CLEARLY SHOWN TO BE INCORRECT AND HARMFUL.

This Court has stated, “Reluctant as we are to depart from former decisions, we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle.”²⁷ “[C]ourts must have and exert the capacity to change a rule of law when reason so requires.”²⁸ A court will abandon a rule on a clear showing that it is incorrect and harmful.²⁹ This Court addressed several ways in which a rule might be shown to be incorrect and harmful:³⁰

The meaning of “incorrect” is not limited to any particular type of error. We have recognized, for example, that a decision may be considered incorrect based on inconsistency with this court's precedent . . . [or] inconsistency with our state constitution or statutes A decision may also be incorrect if it relies on authority to support a proposition that the authority itself does not actually support. . . .

A decision may be “harmful” for a variety of reasons as well. In *Devin*, we found one of our early 20th century precedents harmful where its application denied compensation to crime victims contrary to more recent changes in constitutional and statutory law. . . . And in *Stranger Creek*, a long standing precedent was deemed harmful where it would have destroyed the

²⁷ *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (quoting *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *deElche v. Jacobsen*, 95 Wn.2d 237, 247, 622 P.2d 835 (1980))).

²⁸ *In re Stranger Creek & Tributaries*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (quoted in *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011)).

²⁹ *E.g.*, *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011); *In re Stranger Creek & Tributaries*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

³⁰ *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011).

public benefit in the best use of the State's trust lands. . . . Although the harm in each of these cases was specific to the facts before us, the common thread was the decision's detrimental impact on the public interest. The above examples are certainly not exclusive. Nor do they represent factors or requirements for showing that a decision is incorrect and harmful.

State v. Barber, 170 Wn.2d 854, 864-65, 248 P.3d 494 (2011) (internal citations omitted).

Wills is incorrect because it is inconsistent with prior and subsequent precedent, (*see above*).³¹ *Wills* also contradicts statute. The *Wills* court stated that “[t]here is nothing to suggest that the limitation of actions for medical malpractice embraces a claim for wrongful death,”³² even though Legislature explicitly included wrongful death in the medical negligence statutes.³³ *Wills* blatantly rejects the very concept of a statute of repose, (in derogation of RCW 4.16.350), stating that to bar an action before it accrues “seems to us illogical and unjust.”³⁴ Finally, *Wills* relies on authority to support a proposition that the authority itself expressly rejects. *Wills* concluded that the statute of limitations at RCW 4.16.080(2) applies to cases of wrongful death based on medical negligence, because RCW 4.16.350 applies only to “personal injury,” and wrongful death is

³¹ See Arguments 1-3, (*above*), and footnotes and cases cited herein.

³² *Wills*, 56 Wn. App. at 762; *see Fast* at 52.

³³ See RCW 7.70.150; RCW 7.70.090; Argument 1 herein.

³⁴ *Wills*, 56 Wn. App. at 762; *see Fast* at 52; *see also Fast Br.* at 20-23; *Fast Reply Br.* at 10-11; *Pet. for Rev.* at 10-13, 19.

not a “personal injury” to the statutory beneficiaries.³⁵ *Wills* cited *Dodson*³⁶ for the rule that RCW 4.16.080(2) applies to cases of wrongful death, which in turn stated that “our decision in *Robinson* . . . seems to render this plain.”³⁷ The essential holding in *Robinson*, however, was that wrongful death is subject to the three-year statute of limitations at RCW 4.16.080(2) rather than the two-year statute of limitations at RCW 4.16.130, precisely because wrongful death is indeed personal injury to the statutory beneficiaries.³⁸

Wills is harmful because it removes cases of wrongful death based on medical negligence from the medical negligence statutes. Legislature found that the statute of limitations and repose at RCW 4.16.350 are necessary to lessen the cost of professional negligence insurance to health care providers, and to prevent the manifest injustice of forcing health care providers to defend against stale claims.³⁹ Legislature intended that the tolling provision on making a good faith request for mediation, (RCW 7.70.110), would further serve to reduce the cost of litigation and medical malpractice insurance premiums.⁴⁰ Legislature found that these interests

³⁵ *Wills*, 56 Wn. App. 757; see also *Fast Reply Br.* at 3-8.

³⁶ *Dodson v. Cont'l Can Co.*, 159 Wash. 589, 294 P. 265 (1930) (cited in *Wills*, 56 Wn. App. at 760); see also *Fast Reply Br.* at 6.

³⁷ *Dodson*, 159 Wash. At 592; see also *Fast Reply Br.* at 6.

³⁸ *Robinson v. Baltimore & S. Mining & Reduction Co.*, 26 Wash. 484, 67 P. 274 (1901); see *Fast Reply Br.* at 3-11.

³⁹ See *Fast Br.* at 20-23; *Fast Reply Br.* at 10-11; *Pet. for Rev.* at 9-12.

⁴⁰ *Id.*

were in pursuit of the public interest to ensure supply and access to health care in the state of Washington.⁴¹ *Wills* circumvents the intent of Legislature and violates public policy by preserving wrongful death causes of action based on medical negligence, perhaps decades after a negligent act or omission. Given this Court's recognition of a lost chance injury,⁴² the *Wills* rule would open the floodgates of litigation against health care providers, increase the costs of litigation, drive up premiums for medical malpractice insurance, and endanger Washington residents' access to health care.⁴³ *Wills* is incorrect and harmful and should be overturned.⁴⁴

The lower court's contention that Legislature acquiesced to the interpretation in *Wills* is incorrect,⁴⁵ especially in light of the many contradictory cases to which Legislature could also be said to have acquiesced.⁴⁶ The best counterexample proving that Legislature did not acquiesce to the interpretation in *Wills* is found in Legislature's own words, 16 years following *Wills*: At RCW 7.70.150, Legislature refers to "an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of

⁴¹ *Id.*

⁴² See *Fast Br.* at 23-27; *Fast Reply Br.* 9-11; *Pet. for Rev.* at 9-13, 19-20.

⁴³ *Id.*

⁴⁴ See also *Fast Reply Br.* at 3-11; *Fast Br.* at 27-29.

⁴⁵ See *Pet. for Rev.* at 20.

⁴⁶ See Arguments 1-3 herein.

care,” (Laws of 2006, ch. 8, § 304). *Wills* is incorrect and harmful, and should be overturned. See Assignments of Error # 5, # 6, and # 7.

5. THIS CASE IS DISTINGUISHED FROM *DEGGS*, AND THIS COURT’S ULTIMATE OPINION IN *DEGGS* WOULD NOT AFFECT THE ISSUE HERE.

The issue before this Court in *Deggs* is whether a statutory beneficiary’s wrongful death cause under chapter 4.20 RCW is a cause of action separate from the underlying tort on which it is based, such that it accrues, (and the limitations period begins), separately from the underlying tort.⁴⁷ This case is distinguished from *Deggs*. First, Legislature does not prescribe a statute of limitations applicable to wrongful death actions,⁴⁸ and Legislature does not prescribe when wrongful death actions accrue.⁴⁹ Legislature does, however, carve out an exception for *any* civil action *based on* medical negligence: Such actions accrue at the time of the negligent act or omission,⁵⁰ and are limited to three years.⁵¹ A wrongful death action based on medical negligence is limited by RCW 4.16.350, regardless of whether the cause is distinct from the underlying tort.

⁴⁷ See *Deggs v. Asbestos Corp., Ltd.*, 188 Wn. App. 495, 354 P.3d 1, review granted, 184 Wn.2d 1081 (2015); *Deggs Br.*; *Deggs Resp. Br.*; *Deggs Pet. For Rev.*

⁴⁸ See *Fast Br.* at 11-12; chapter 4.20 RCW and 4.16 RCW.

⁴⁹ See chapter 4.20 RCW.

⁵⁰ RCW 4.16.350.

⁵¹ RCW 4.16.350.

Second, the issue of accrual is irrelevant here. Even if the Fasts' cause accrued on the day their child died, (as opposed to the days when negligent health care was provided to Jamie), they nonetheless requested mediation within three years of the death, (and well within three years of Jamie's course of treatment). The issue here is not when the Fasts' cause accrued, but rather whether their cause is for damages for injury occurring as a result of health care based on medical negligence.

Finally, the Fasts' claims here are not based on wrongful death or survival under chapter 4.20 RCW. There is dispute over which, if any, of the Fasts' injuries can be regarded as wrongful death: The patient here was Jamie Fast, Plaintiff; all negligent health care was provided to Jamie, (not to the deceased); and the patient, Jamie, did not die.⁵² The lower court overlooks, for example, that even under its own analysis, the loss of the viable fetus was indeed a personal *and* physical injury suffered by the patient, Plaintiff Jamie Fast, and RCW 4.16.350 should apply.

RCW 4.16.350 applies here, and such will not conflict with this Court's opinion in *Deggs*, regardless of how this Court resolves *Deggs*.

⁵² See *Fast Reply* Br. at 1-3; Of note, there is also a policy question on this point. Division III has reiterated, for example, "Our legislature has articulated a clear policy on the issue of a provider's duty of care relative to parents. . . . The bond between parent and child is 'of paramount importance and any intervention into the life of a child is also an intervention into the life of the parent,' RCW 26.44.010; *Tyner v. Dep't of Soc. & Health Servs.*, 92 Wn. App. 504, 512, 962 P.2d 215 (1998), *rev'd on other grounds*, 141 Wn.2d 68, 1 P.3d 1148 (2000)." *Webb*, 121 Wn. App. at 348-349.

CONCLUSION

Regardless of whether this case is characterized as an action for medical negligence, or for wrongful death *based on* medical negligence, the statute of limitations at RCW 4.16.350 controls. It is clear that Legislature intended that RCW 4.16.350 would control *any* civil cause of action *based on* medical negligence, which includes a wrongful death action *based on* medical negligence. To the extent that *Wills* is inconsistent, it should be overruled. RCW 4.16.350 controls the Fast's case here. The Fast's requested mediation within the applicable statute of limitations, which tolled the statute of limitations for one year, (RCW 7.70.110), within which time the Fast's filed suit. This Court should find that the Fast's case was timely filed, reverse the Court of Appeals in the part of its decision holding otherwise, and remand this case for further proceedings consistent with this Court's ruling.

RESPECTFULLY SUBMITTED this 1st day of April, 2016



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CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a true and complete copy of the following document(s) to be served on the following persons in the manner indicated below:

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DATED this 1ST Day of APRIL, 2016



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Dear Clerk of Court:

Please find attached a cover letter and Petitioners' Supplemental Brief. We ask your assistance in filing the Petitioners' Supplemental Brief. Thank you for your time and attention to this matter. Please do not hesitate to contact me at any time should you have any questions, comments, or concerns.

Very Truly Yours,

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